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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 135

PAUL R. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Paul R. Jones, hereby petitions for a rehearing of this Court's October 9, 1967 denial of a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, affirming his conviction for perjury in the swearing to an affidavit submitted for the purpose of obtaining a new trial for one Mittelman.

On October 9, 1967, this Court granted review in two cases on its Miscellaneous Docket, *United States ex rel. Garner* v. *Yeager* and *Bruton* v. *United States.** In both of these cases, the constitutional question to be reviewed

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* These cases are now respectively Nos. 704 and 705; on October 9, they were respectively Nos. 66 Misc. and 109 Misc.

was essentially whether a charge to the jury, that the confession of a co-defendant could be used solely against the declarant and not against petitioner, violates due process. (This type of charge previously had been approved by this Court in *Delli Paoli* v. *United States*, 352 U. S. 232.) In the case at bar, the first paragraph of the charge to the jury (reprinted as Appendix A hereto) was totally indistinguishable from the charges to be reviewed here in *Garner* and *Bruton*. It would therefore seem that review should be granted here.

Moreover, the charge here went further. The jury was then instructed that the grand jury testimony of petitioner Jones' co-defendant Mittelman, given voluntarily to a grand jury investigating possible perjury in earlier affidavits, for which the grand jury later indicted Jones, was admissible only as to Mittelman, that it was admissible "similarly" to Mittelman's earlier affidavit, and that Mittelman's earlier affidavit was admissible against Jones if Jones had previously furnished an affidavit as part of an agreement to obtain a new trial for Mittelman (Appendix A, *infra*). Thus, though the instructions in *Garner* and *Bruton* protected the petitioners there to extent that the jury could perform the mental gymnastics required by the exclusionary charge, the jury here was invited to consider the admissions of the co-defendant Mittelman against petitioner Jones.[1]

It may be argued that there had been joint action by Jones and Mittelman in submitting the earlier affidavits

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[1] The Government noted in its Brief here that Mittelman's grand jury testimony "contained admissions which, viewed with the other evidence in the case, the jury found sufficient to warrant conviction." (Brief for the United States in Opposition, p. 14.) The Court below mentioned the possibility of Mittelman's grand jury testimony having been considered by the jury, but thought such consideration would have been "in violation of the instructions." (See Jones' petition, pp. 10a-11a.) In any event, the instructions here did not begin to approach the clarity of the oft-repeated instructions in *Garner* and *Bruton*.

ruled perjurious, thus enabling the later admissions (made after complete termination of all joint action) of Mittelman to be used against Jones. But even then, the same question is presented as in *Garner* and *Bruton*, for in both those cases the defendants acted jointly in the commission of their crimes. (As to *Garner*, see *State* v. *Sullivan*, 43 N. J. 209, 216, 221, 236; as to *Bruton*, see his petition here, p. 2, noting Bruton was tried as an accomplice with his co-defendant.)

If *Garner* and *Bruton* deserve review, the case at bar deserves review *a fortiori*—for these reasons:

1. *Garner* is a collateral attack, on a state conviction. The case at bar is a direct non-collateral attack, upon a federal conviction.

2. The charge here was not as clear as in *Garner* and *Bruton*. See, n. 1, *supra*, and *infra* Appendix A.

3. If it be true that the grand jury testimony was merely cumulative to the other evidence in Jones, as the Court below ruled (though we disagreed at pp. 1-2 of our Reply Brief), it is true the challenged confession in *Bruton* was cumulative also, since there was eyewitness identification of Bruton by one of the victims of the crime sufficient to sustain his conviction (Bruton's petition, pp. 11, 21).

4. In the case at bar, objection was made and exception noted to the challenged instruction. In *Bruton*, no exception was taken to the instruction (Bruton's petition, p. 19).

5. In the case at bar, petitioner Jones had repeatedly requested a severance. In *Bruton*, no motion for a severance had been made (Bruton's petition, pp. 6, 18).

6. In *Garner*, his co-defendant Aiken, whose confession was clearly limited by the Court's instructions to con-

sideration against Aiken only, also appeared and testified at the trial, where he was subject to cross-examination. In the case at bar, Mittelman (Jones' co-defendant) did not appear as a witness at the trial, and could not have been the subject of cross-examination by petitioner Jones.

CONCLUSION

Petition for rehearing should be granted.

Respectfully submitted,

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Certificate of Counsel.

HERBERT MONTE LEVY, attorney of record for petitioner Paul R. Jones, hereby certifies 1) that the above petition for rehearing filed pursuant to Rule 58(2) of the Rules of this Court is presented in good faith and not for delay, and 2) that said petition is restricted to grounds confined to intervening circumstances of substantial and controlling effect, and to other substantial grounds available to petitioner Jones although not previously presented.

HERBERT MONTE LEVY.

Appendix A.

I already have instructed you that the Grand Jury testimony of each defendant was received into evidence only as to the defendant whose testimony it was and not as to the other defendant. But to be sure, I repeat: The Grand Jury testimony of Mittelman is received only as to Mittelman and not as against Jones and, similarly, the Grand Jury testimony of Jones is received only as to Jones and not as against Mittelman. You are not to consider the Grand Jury testimony of Mittelman in determining the guilt or innocence of Jones and you are not to consider the Grand Jury testimony of Jones in determining the guilt or innocence of Mittelman.

Similarly, Mittelman's affidavit is not admissible as to Jones and Jones' affidavit is not admissible as to Mittelman unless you first find that the government has established Jones' connection with Mittelman's affidavit, and Mittelman's connection with Jones' affidavit.

By this I mean the following: If you find that Mittelman, either alone or through his duly authorized attorney, knew about, secured and procured Jones' affidavit and knew of the substance of the contents of Jones' affidavit and submitted Jones' affidavit in support of Mittelman's application for a new trial, then you may decide that Mittelman is bound by Jones' affidavit and the connection would have been established if you so find.

Similarly, if Jones knew at the time he prepared and signed and swore to his affidavit, if he did swear to his affidavit, that he was submitting this affidavit for the purpose of assisting Mittelman in obtaining a new trial, and if you find or infer, an inference being evidence also, that Jones knew the reason why and the purpose for his affidavit, and if you infer and so find that Jones discussed with Mittelman or with Mittelman's duly authorized attorney his affidavit, as part and parcel of a common agreement or undertaking to secure a new trial by means of a motion for Mittelman, then you may consider, if you so find, Jones' (*sic*) affidavit with respect to Mittelman (*sic*) [GA 115a-116a].